IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.07.2007

CORAM

THE HONOURABLE Mr. JUSTICE P.D.DINAKARAN
and
THE HONOURABLE MR. JUSTICE P.P.S. JANARTHANA RAJA

Writ Petition No.26203 of 2001
and WPMP.No.38776 of 2001

The State of Tamilnadu,
rep. by the Deputy Commissioner (CT),
Vellore Division,
Vellore. .. Petitioner

vs.

1.Tvl.Southern Agrifurane Industries Ltd.,
Mundiyambakkam, Villupuram.

2.The Registrar,
Tamilnadu Taxation Special Tribunal,
Chennai-1. .. Respondents

Writ Petition under Article 226 of the Constitution of India for the issuance of a writ of certiorari to call for the records relating to the order of the second respondent made in TC(R) No.2794 of 1997 dated 6.7.2000 and quash the same.

For Petitioner .. Mr.R.Tholgappian
Government Advocate
For Respondent .. Mr.N.Inbarajan-R1

O R D E R

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(Delivered by P.D.DINAKARAN, J.)

The pivotal issue that arises for our consideration in this writ petition is whether the impugned penalty under Section 12(3) of the Tamil Nadu General Sales Tax Act (for brevity "the Act") levied by the writ petitioner/Revenue against the first respondent dealer for non inclusion of the excise duty and vend fee in the taxable turnover for the assessment year 1986-87 is justified in law?

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2.1. Before proceeding further, it is apt to refer Section 12 (3) of the Act, which empowers the writ petitioner/Revenue to levy penalty for non-inclusion of excise duty and vend fee in the taxable turnover of the first respondent/dealer.

> 12. Procedure to be followed by the assessing authority:-
>
> (1) ...
>
> (2) ...
>
> (3) In addition to the tax assessed under sub-section (2), the assessing authority may, in the same order of assessment passed under sub section (2), or by a separate order, direct the dealer to pay by way of penalty--
>
> (a) a sum which shall not be less than fifty percent but which shall not be more than one hundred and fifty percent of the amount of tax due on the turnover that was not wilfully disclosed by the dealer in his return, or
>
> (b) a sum which shall not be less than fifty per cent but which shall not be more than one hundred and fifty percent of the tax assessed in the case of wilful failure to submit a return.

2.2. It is not in dispute that the Constitutional Bench of the Apex Court as early as in the year 1985 in M/s.McDowell & Co. Ltd. vs. Commercial Tax officer, reported in 59 STC 277, in a matter which arises under Andhra Pradesh Excise Act and Andhra Pradesh Distillery Rules, 1970 and 1976, held that the liability for payment of excise duty and vend fee was that of the manufacturer and the payment of the same is an exclusive obligation of the manufacturer and if the payment be made under a contract or arrangement by any other person, it would amount to meeting of the obligation of the manufacturer and nothing more. It was further held that the payment of excise duty was a condition precedent to the removal of the liquor from the distillery and payment by the purchaser was on account of the manufacturer. The excise duty, though paid by the purchaser to meet the liability of the dealer, was a part of the consideration for the sale and was therefore includable in the turnover of the dealer. The said decision of the Constitutional Bench of the Apex Court in M/s.McDowell & Co. Ltd. vs. Commercial Tax officer, (cited supra) is dated 17.4.1985.

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2.3. But, still in the instant case, the first respondent/dealer failed to include the excise duty and vend fee in the taxable turnover for the assessment year 1986-87, which warranted the writ petitioner/Revenue to invoke Section 12(3) of the Act and levy penalty by his order dated 23.2.1988, as hereunder:

i)	Penalty under Section 12(3) of the Act for non-inclusion of excise duty & vend fee in the sales turnover of IMFL	: Rs.48,60,841.00
ii)	Penalty under Section 3(2) of the TNST (SC) Act 1971 r/w Section 12(3) of the principle Act	: Rs. 355.00
	Total penalty levied	: Rs.48,61,196.00
	Penalty paid	: Rs. Nil
	Balance	: Rs.48,61,196.00

2.4. Aggrieved by the said order dated 23.2.1988 imposing penalty under Section 12(3) of the Act, the first respondent/dealer preferred an appeal before the Appellate Assistant Commissioner, Cuddalore, who by order dated 20.2.1989 held that the inclusion of excise duty and vend fee in the taxable turnover is mandatory and therefore the non inclusion of the same in the taxable turnover attracts penalty and empowers the writ petitioner/Revenue to levy penalty under Section 12(3) of the Act. On further appeal, the Sales Tax Appellate Tribunal by order dated 3.2.1992, deleted the penalty imposed under Section 12(3) of the Act, appreciating the case of the dealer that he did not wilfully fail to include excise duty and vend fee in the taxable turnover and thus accepted the bona fide on the part of the dealer. The order of the Tribunal was thereafter confirmed by the Tamilnadu Taxation Special Tribunal in its order dated 6.7.2000 finding that there was no wilfulness and deliberate intention on the part of the dealer to attract penalty under Section 12(3) of the Act. Hence, the Revenue has preferred the above writ petition seeking a writ of certiorari to call for the records relating to the order of the second respondent made in TC(R) No.2794 of 1997 dated 6.7.2000 and quash the same.

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3.1. Substantiating the bona fide, Mr.Inbarajan, learned counsel appearing for the first respondent/dealer, invited our attention to Rule 22 of the Tamil Nadu Indian-made Foreign Spirit (Manufacture) Rules (for short "the Manufacture Rules) as amended by G.O.Ms.No.711 (Prohibition and Excise) dated 04.10.1982, which reads as follows:

> 22. Payment of excise duty and vend fee:-
>
> (1) An excise duty, at such rate as the State Government may prescribe from time to time, shall be paid by the person who removes the goods from a manufactory, on the stock of Indian-made foreign spirits so removed from the manufactory.
>
> (2) A vend fee of rupees two per bulk litre shall be paid by the licensee on all stocks of Indian-made foreign spirits issued from the manufactory."

3.2. Mr.Inbarajan, learned counsel appearing for the first respondent/dealer submits that unlike the facts and circumstances in McDowell & Co. Ltd. v. Commercial Tax Officer (cited supra), the liability for payment of excise duty and vend fee was transferred from the hands of the manufacturer to the hands of the person who removes the goods from the manufactory viz., TASMAC in the instant case and the vend fee shall also be paid by the licensee on all stocks of IMFS viz., TASMAC in the instant case, by statutory provision. It is under such shifting of statutory provision, the petitioner, despite the ruling of the Apex Court dated 17.4.1985, had not chosen to include the excise duty and vend fee in the taxable turnover till the law is settled thereafter by a Division Bench of this Court in Mohan Breweries and Distilleries Ltd. v. Commercial Tax Officer reported in 78 STC 461, by its judgment dated 25.4.1989, where the Division Bench refused to accept the argument made on behalf of the dealer distinguishing the judgment of the Apex Court in McDowell & Co. Ltd. v. Commercial Tax Officer (cited supra), taking recourse of the Rule 22 of the Manufacture Rules referred to above.

3.3. According to Mr.Inbarajan, the law came to be settled by the pronouncement of the judgment in Mohan Breweries and Distilleries Ltd. dated 25.4.1989 (cited supra) and therefore, the non inclusion of excise duty and vend fee in the taxable turnover for the assessment year 1986-87 cannot be considered as wilful commission or omission on the part of the dealer and hence the Appellate Tribunal and the Special Taxation Tribunal had rightly deleted the penalty imposed under Section 12(3) of the Act.

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3.4.1. It is true that colourable devices cannot be a part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods, as it is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges, as in the words of Ranganath Misra,J. in McDowell & Co. v. Commercial Tax Officer (cited supra).

3.4.2. The financial needs of the welfare State, if backed by the law have to be respected and met. There is behind taxation laws as much moral sanction as is behind any other welfare legislation and it is a pretence to say that avoidance of taxation is not unethical and that it stands on no less a moral plane than honest payment of taxation. The proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax and whether the transaction is such that the judicial process may accord its approval to it. It is neither fair nor desirable to expect the Legislature to intervene and take care of every device and scheme to avoid taxation, as in the words of Chinnappa Reddy,J. in McDowell & Co. v. Commercial Tax Officer (cited supra).

3.5. However, it is made clear in McDowell & Co. v. Commercial Tax Officer that it is up to the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of "emerging" techniques of interpretation to expose the devises for what they really are and to refuse to give judicial benediction.

3.6. In this context, our attention was also drawn to the decision of a Full Bench of this Court in State of Tamil Nadu v. Nu-Tread Tyres, reported in 148 STC 256, on the question whether "mens rea" is a relative criteria for imposing penalty to qualify the expression "falsely represents" employed under Section 10(b) and 10(A) of the Central Sales Tax, wherein the Full Bench, after following the decision of the Apex Court in State of Rajasthan v. Jaipur Ydyog Limited, reported in 30 STC 565 and referring to the various decisions of the High Courts on the point, held as follows:

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> "The expression "falsely represents" clearly shows that the element of mens rea is the necessary component of the offence. In the absence of mens rea, resort to penal provision would not be proper unless it is established that the conduct of the dealer was contumacious or that there was deliberate violation of the statutory provision or wilful disregard thereof. If the registered dealer honestly believes that any particular goods are embraced by the certificate of registration and on that belief makes a representation, he cannot be held guilty of the offence under section 10(b) of the Act and no penalty can be imposed under section 10-A of the Act. The question whether the assessee acted under the honest belief is a question of fact. Therefore, in our view, "mens rea" is an essential ingredient for the levy of penalty under Section 10 (b) of the Central Sales Tax Act, 1956. The reference is answered accordingly."

4.1. Our attention is also invited to the fact that there was no statutory provision as provided in the instant case under Rule 22 of the Manufacture Rules, for transferring such liability of the payment of excise duty from the hands of the manufacturer to the person who removes the goods from the manufactory or by the licensee (vend fee), in the McDowell's case, where the payment of excise duty and vend fee were met by any other person on behalf of the manufacturer under a contract or arrangement to discharge the primary and exclusive obligation of the manufacturer, the inclusion of excise duty and vend fee in the taxable turnover is mandatory.

4.2. As it is not in dispute that only by pronouncement of judgment dated 25.4.1989 in Mohan Breweries and Distilleries Ltd. (cited supra), despite Rule 22 of the Rules, both excise duty and vend fee shall be included in the taxable turnover only by the manufacturer, we do not see any wilful commission or omission on the part of the first respondent/dealer for non inclusion of the excise duty and vend fee for the assessment year 1986-87.

4.3. The explanation offered on behalf of the dealer also stands supported by the decision of the Apex Court in EID Parry (I) Ltd. v. Assistant Commissioner (C.T.), reported in 117 STC 457, wherein it is held that the penalty could not be levied for failure to include the subsidy and the excess transport charges in the return of turnover, since the correct position of law was in doubt and the amounts had not been included in the return of turnover in the bona fide belief that they were not includable in

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the taxable turnover. It could not be said that the dealers had acted in deliberate defiance of the law or that their conduct was dishonest or that they had acted in conscious disregard of their obligation under the Sales Tax Act.

4.4. That apart, the direct application of the ratio laid down in McDowell's case (cited supra), which deals with tax component, cannot be imported and applied to justify the levy of penalty under Section 12(3) of the Act, whereunder 'mens rea' is a statutory condition precedent for imposing levy of penalty.

4.5. It is also pertinent to note that the decision of this Court in Mohan Breweries case (cited supra) was confirmed by the Apex Court only on 9.9.1997. If the commission or omission on the part of the dealer for non inclusion of excise duty and vend fee is tested by the reasonings as put forth by the dealer taking recourse under Rule 22 of the Manufacturer Rules and the decisions rendered thereunder in Mohan Breweries and Distilleries's case (cited supra), we do not see any reason to interfere with the orders of the Sales Tax Appellate Tribunal and Taxation Special Tribunal in deleting the penalty imposed under Section 12(3) of the Act.

Finding no reason to interfere with the order of the Tribunal, the writ petition stands dismissed. No costs. Consequently, WPMP.No.38776 of 2001 is also dismissed.

ATR

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Deputy Commissioner (CT),
   Vellore Division,
   Vellore.

2.The Registrar,
  Tamilnadu Taxation Special Tribunal,
  Chennai-1.

+ 1 cc to Mr. N. Inbarajan, Advocate SR No. 40168
+ 1 cc to Spl Government Pleader, Advocate SR No. 40245

MJ(CO)
SR/31.8.2007 W.P.No.26203 of 2001

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